Supreme Court, U.S.
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No. 01-1837

In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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SUMMARY OF ARGUMENT

Petitioners, Joseph Caldrello and Sandra Caldrello ("Petitioners"), ask this Honorable Court to grant their Petition for Writ of Certiorari (the "Petition") and – and in so doing – to pass upon purported constitutional questions that were neither properly raised nor decided below. While it is difficult to determine the basis of Petitioners' constantly-changing arguments, they appear to now claim the Connecticut courts erred in holding that FDIC and two private financial institutions did not "take" Petitioners' property in violation of the Fourth, Fifth, Seventh and Fourteenth Amendments to the Constitution. These claims of error – asserted for the first time here – simply do not provide a jurisdictional basis for review by this Court.

Additionally, Petitioners' claims that their constitutional rights were violated are utterly without merit. Petitioners simply do not – and cannot – articulate the legal basis for their claims under the Fourth, Fifth, Seventh and Fourteenth Amendments of the Constitution. Accordingly, the Petition should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

I. The First Trial and First Appeal.

A predecessor in interest of Republic Credit Corporation I ("Republic"), First Constitution Bank ("First Constitution"), instituted this foreclosure action in the Connecticut Superior Court in September of 1989. On September 8, 1992, after a trial on the merits, the court entered a judgment of strict foreclosure in favor of First Constitution. Shortly thereafter, on October 2, 1992, First Constitution became insolvent, and FDIC was appointed its receiver. FDIC was later substituted as plaintiff in lieu of the defunct First Constitution.

On October 8, 1992, Petitioners filed their first appeal to the Connecticut Appellate Court, requesting that the court address certain claims of evidentiary error on the part of the trial court. The Connecticut Appellate Court agreed with Petitioners and remanded the case for a new trial. See First Constitution Bank v. Caldrello, 37 Conn. App. 529, 656 A.2d 1053 (1994). See Respondent's Appendix ("App.") at 13-18.

II. The Second Trial and Second Appeal.

In 1999, this matter was again tried before the Connecticut Superior Court. On October 7, 1999, the trial court issued a memorandum of decision, entering a judgment of strict foreclosure in favor of FDIC. See Petitioners' Appendix at 14-35. The trial court also found that, although Petitioners had asserted counterclaims alleging that First Constitution had improperly exercised a right to set off with respect to certain certificates of deposit, Petitioners had introduced no evidence supporting these counterclaims at trial. Additionally, the trial court noted these same claims had been raised and resolved against Petitioners in a separate action filed by them in federal court.

Finally, the trial court specifically refused to address Petitioners' claims of wrongful conduct on the part of First Constitution and FDIC. The trial court first noted that none of these claims were properly considered because they were not part of the pleadings. Although the trial court recognized its inherent equitable power to adjudicate these issues, it declined to do so because it found the claims to be collateral to the foreclosure

action, and because the claims had already been adjudicated in the separate federal court action.

Petitioners appealed the trial court's decision to the Connecticut Appellate Court. On or about May 10, 2000, during the pendency of this second appeal, Republic purchased the subject note and mortgage from FDIC and acquired all of FDIC's interests in and to the note and mortgage.

The Connecticut Appellate Court affirmed the decision of the trial court in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005 (2002). See Petitioners' Appendix at 2-13. This decision is discussed in great detail in Argument Section I.A. below. Petitioners then filed a petition for certification to the Connecticut Supreme Court. See App. at 13-18. This petition was denied on March 14, 2002. See FDIC. v. Caldrello, 260 Conn. 903, 793 A.2d 1088 (2002). See Petitioners' Appendix at 1. Petitioners now seek review of the Connecticut Appellate Court decision via petition for a writ of certiorari to this Court.

III. Factual Misstatements in Petition.

While Republic disputes the relevance of many of the purported "facts" offered by Petitioners in support of the Petition, a

number of the factual liberties Petitioners have taken in their submission to this Court must be addressed.

First, Petitioners make various claims regarding First Constitution's misplacement of funds, its improper release of stock to third parties, its alleged redepositing of funds on a bank holiday and claim that this evidence was not "seriously challenged" at trial. See Petition at 3-5. This evidence was, in fact, challenged and, as discussed above, was rejected by the trial court.

Petitioners also claim that inconsistencies in trial testimony regarding the status of Petitioners' loan give rise to an inference that First Constitution and/or FDIC altered certain documents to support its foreclosure action. See Petition at 5-6. They also contend that that FDIC and/or Republic's failure to produce certain documents is further evidence of wrongdoing. See Petition at 6. These claims were contested by FDIC and fully adjudicated by the trial court, which ultimately rejected Petitioners claims. Petitioners did not challenge any of these findings of fact on appeal to the Connecticut Appellate Court.

While Petitioners claim that they have made "repeated demand" upon Republic for a quit claim deed to certain property

that was inadvertently included in the property description in a tax sale deed to FDIC, this cannot be further from the truth.[1] Indeed, Republic has indicated its willingness to provide a quit claim deed to the City of New London, from which it obtained the allegedly defective tax sale deed, to remedy any claimed damage incurred by Petitioners. Petitioners have never responded to this offer.

Petitioners also make numerous claims regarding FDIC's purported transfer of the subject mortgage and note to Republic. However, while Petitioners claim that FDIC's conduct was wrongful and violated internal procedures, they have not identified any specific policy, regulation or statute forming the basis for their claims.

ARGUMENT

I. The Petition Should be Denied Because Federal Questions were not Properly Raised or Decided Below.

The Petition should be denied because this Court lacks jurisdiction to review issues raised for the first time therein. While Petitioners claim they seek review of the decision of the

[1] Petitioners have filed a separate action in Connecticut state court seeking to quiet title to the subject property. Having lost at the trial court level, Petitioners have appealed that case to Connecticut Appellate Court. That appeal is still pending. Therefore, any issues relating to the tax sale deed are irrelevant to the Petition.

Connecticut Appellate Court in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002), they failed to raise any issue of federal statutory or constitutional law in that appeal. As a result, the Connecticut Appellate Court did not decide any such federal question. Petitioners' petition for review by the Connecticut Supreme Court likewise did not raise the federal constitutional issues which now provide the basis for their appeal to this Court. See App. at 1-12.

As this Court is well aware, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. Moreover, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Id. Rule 10(c), which Petitioners cite as the sole basis for this Court's jurisdiction, states that the Court may grant a petition for a writ of certiorari where

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

S. Ct. Rule 10(c). Consistent with Rule 10(c), 28 U.S.C. § 1257 states as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

> may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (emphasis added).

Although Petitioners argue that "special and important reasons" warrant the granting of their Petition and cite violations of their rights under various Amendments to the United States Constitution, their Petition must be denied because Petitioners failed to properly raise these issues in the proceedings below. Petitioners have also failed to clearly and cogently state the manner in which their rights under the Constitution were violated.

A. There Were No Issues of Federal Constitutional or Statutory Law Decided by the Connecticut Appellate Court.

The decision of the Connecticut Appellate Court which Petitioners ask this Court to review, FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002), reveals that no federal questions were raised or decided below.

Rather, the Appellate Court opinion decided issues of Connecticut procedural, evidentiary and substantive law that have no constitutional implications and which did not deny Petitioners any rights under the Constitution. The issues decided are clearly set forth in the Appellate Court opinion:

> On appeal, the defendants argue that the court improperly (1) opened the judgment of nonsuit more than twenty months after it had been rendered, (2) allowed the plaintiff, the Federal Deposit Insurance Corporation (FDIC), to introduce certain evidence and testimony of a witness, which had not been disclosed to the defendants until the eve of trial, and (3) failed to adjust the verdict for the undisputed unclean hands of the FDIC.

FDIC v. Caldrello, 68 Conn. App. at 69.

The first issue presented by Petitioners to the Appellate Court – whether the trial court improperly opened the nonsuit entered against the plaintiff – was entirely an issue of state law. Indeed, in determining whether the trial court acted properly, the Appellate Court first examined the language of Connecticut General Statutes § 52-212, the state statute that allows a trial court

to open a nonsuit against a plaintiff.[2] Although the language of General Statutes § 52-212, authorizes a court to set aside a nonsuit within four months of its entry, the Appellate Court – relying upon prior Connecticut Appellate Court decisions[3] – held that the four months contemplated by the statute did not begin to run until plaintiff received notice of the nonsuit. After examining the evidence relied upon by the trial court, the Appellate Court ruled the trial court "had the authority and properly granted the motion to open the judgment of nonsuit." Id. at 74.

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[2] Connecticut General Statutes § 52-212 provides, in pertinent part, as follows:

> (a) Any judgment rendered or decree passed upon a default or nonsuit in the superior court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.

Conn. Gen. Stat. § 52-212 (1991).

[3] See Habura v. Kochanowicz, 40 Conn. App. 590, 592, 672 A.2d 512 (holding that where party does not receive notice of entry of judgment, time for reopening under Conn. Gen. Stat. § 52-212 is extended); Tyler E. Lyman, Inc. v. Lodrini, 63 Conn. App. 739, 747, 780 A.2d 932 (2001) (same).

Next, the Appellate Court addressed Petitioners' claims of evidentiary error and, specifically, their claim the trial court improperly allowed plaintiff to introduce documentary evidence, as well as the testimony of a witness disclosed twelve days before trial. The Appellate Court rejected Petitioners arguments, ruling the trial court did not abuse its discretion in allowing plaintiff to introduce the subject evidence. In so ruling, the Appellate Court noted the evidence was merely "supporting documentation of evidence previously disclosed to defendants." Id. at 77. Therefore, the Appellate Court determined that Petitioners could not claim they were unduly prejudiced. The Appellate Court also noted that, when the trial court asked whether a continuance would be helpful to Petitioners, they responded in the negative. See id.

Finally, the Appellate Court held the trial court did not err in failing to adjust the verdict for plaintiff's allegedly unclean hands. At the trial court level, Petitioners claimed that First Constitution's loss of a $300,000 check somehow caused their inability to pay their mortgage. The trial court refused to reduce the verdict, finding these claims "collateral to the mortgage," especially in light of the fact that the losses claimed were business

losses that were unrelated to the mortgage at issue. The trial court further noted there was no evidence the subject mortgage was unusual or unconscionable, and held that the misplaced check claims had been raised in a separate federal district court action and resolved in favor of FDIC. Id. at 79. Accordingly, the Appellate Court held that the trial court "properly declined to grant equitable relief" to Petitioners. Id.

As indicated above, Petitioners did not properly raise – and the Appellate Court did not decide – any issues relating to the United States Constitution. Nor did the Appellate Court decide any other issue of federal law. Indeed, as discussed above, the decision from which Petitioners seek review via writ of certiorari addresses only issues of Connecticut state statutory and common law and contains no conceivable basis for review by this land's highest Court.

B. It is Well-Settled that the Court Lacks Jurisdiction to Decide Federal and Constitutional Questions not Presented to the State Court Below.

This Court has consistently held that constitutional questions not raised by a petitioner in state court and not decided by that state court cannot be reviewed on writ of certiorari. See

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Webb v. Webb, 451 U.S. 493, 498-99 (1981). In fact, this Court has recognized this rule as one of the fundamental tenets of its jurisprudence: "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale, 394 U.S. at 438.

In Cardinale, the petitioner asserted a constitutional challenge to a Louisiana statute that required confessions to be admitted in their entirety during a defendant's criminal trial. Although the Court originally granted certiorari to address the constitutionality of the statute at issue, it ultimately held it did not have jurisdiction because petitioner asserted the constitutional challenge for the first time in his petition for a writ of certiorari. In dismissing the writ, Cardinale relied upon Crowell v. Randall, 10 Pet. 368, in which Justice Story concluded that no jurisdiction existed over appeals from state court decisions, "unless a federal question was raised and decided in the state court below." Cardinale, 394 U.S. at 438 (emphasis added). This Court noted that it "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court

decisions" both before and after Crowell. Id. at 438 (citing Miller v. Nicholls, 4 Wheat. 311, 315 (1819); Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, n.7 (1959); State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 160-63 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940); Whitney v. California, 274 U.S. 357, 362-63 (1927); Dewey v. Des Moines, 173 U.S. 193, 197-201 (1899); Murdock v. City of Memphis, 20 Wall. 590 (1875)).

Additionally, Cardinale articulated the "sound reasons" for its consistent refusal to decide federal questions that were not first raised in state courts. Particularly, Cardinale reasoned that cases where federal questions were not raised below are likely to lack an adequate record for review. Id. at 439. This Court also cited the importance of giving state courts the first opportunity to consider the constitutionality of their own laws. See id.

Likewise, in Webb v. Webb, 451 U.S. at 493, this Court dismissed a writ of certiorari in a case where petitioner sought review of a Georgia Supreme Court decision upholding a trial court ruling that petitioner claimed failed to give full faith and credit to a prior Florida judgment.

Specifically, petitioner had filed suit in Florida seeking custody of her son. Fifteen days later, the respondent father filed a similar custody suit in Georgia. A Florida court entered judgment granting the petitioner custody on April 18, 1979. More than two months later, a Georgia court entered a conflicting judgment granting the father custody. After appeal, the Georgia state court decision was affirmed by the Georgia Supreme Court. The mother then filed a petition for writ of certiorari to this Court, requesting that it determine whether the Georgia courts were required by Article IV, § 1 of the United States Constitution[4] to give full faith and credit to the Florida judgment.

Although the Court initially granted the petition for a writ of certiorari, it later dismissed the writ on the basis of the "properly-raised-federal-question" doctrine. See id. at 499-500. As in Cardinale, the Webb Court found the petitioner's failure to raise her federal claim in the state proceedings, and the Georgia Supreme Court's failure to rule on any federal issue, fatal to her

[4] Article IV, § 1 states as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

appeal. See id. at 499-502. The Court took the opportunity to reiterate the policy reasons justifying its declination of jurisdiction:

> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, [to] construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our workload, this is a very substantial matter.

Id. at 500-501.

The Petition should be denied because Petitioners have failed to properly raise, and the Connecticut state courts have failed to adjudicate, any issue of federal law. While Petitioners claim that this case implicates the Fourth, Fifth, Seventh and Fourteenth Amendments to the United States Constitution, they

fail to cite with specificity any point during the state court proceedings – trial or appellate – where they first made such claims as required by Supreme Court Rule 14.1(g)(i).[5] Petitioners have not indicated where they have properly raised and preserved issues of federal law because they cannot.[6]

Indeed, Republic has not been able to locate any reference to any issue of federal law in the Connecticut Appellate Court's decision in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002). As this Court has indicated, where a state court decision "fails to pass upon a federal question, it will be assumed that the omission was due to

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[5] Supreme Court Rule 14.1(g)(i) states as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

[6] Petitioners have also failed to clearly articulate the basis for each of their constitutional claims.

want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary." Webb v. Webb, 451 U.S. at 493, 495-96 (emphasis added) (quoting Street v. New York, 417 U.S. 40, 50, n. 11 (1974)).

In this case, the assumption that Petitioners never properly raised federal questions before the Connecticut courts is unrebutted by the record. Of initial significance is Petitioners' complete failure to raise any constitutional issues at the trial court level. Their failure to raise these issues at the trial court level precludes them from raising them on appeal to the Connecticut appellate courts and before this Court. See Herndon v. Georgia, 295 U.S. 441 (1935) (dismissing appeal from Georgia Supreme Court because petitioner failed to first raise constitutional issue at trial court level).

Nor did Petitioners properly raise their constitutional claims at the appellate court level. In fact, neither the preliminary statement of issues nor the appellate brief submitted by Petitioners raised any federal constitutional or legal issues.

Petitioners' failure to properly raise federal questions below is further highlighted by their failure to include any

discussion of these issues in their petition for review to the Connecticut Supreme Court. See App. at 1-12. As a result of such failure, this Court's review of these issues would be improper for jurisdictional reasons and for reasons of comity, sound public policy and judicial economy.

C. Grave Miscarriage of Justice is Not a Legally Sufficient Basis for the Assertion of Jurisdiction.

Petitioners proffered reason as to why this Court should grant their Petition – that a "grave miscarriage of justice" would result absent relief – does not remedy their failure to raise constitutional questions below, and does not provide a sufficient basis for this Court's jurisdiction. Indeed, Petitioners' representation that United States v. Beggerly, 524 U.S. 38 (1998), supports the argument that this Court may exercise extra-statutory appellate jurisdiction in cases were a petitioner has shown "grave miscarriage of justice" is entirely disingenuous.

Rather, the primary issue in Beggerly was whether the district court had properly exercised jurisdiction under Federal Rule of Civil Procedure 60(b) in entertaining an action to set aside

a prior judgment in a separate district court action. See id. at 42.[7] Moreover, the court in Beggerly ultimately held that the respondent's allegations that the government failed to "thoroughly search its records and make full disclosure to the Court" did not constitute a grave miscarriage of justice. Id. at 47.

II. Petitioners' Constitutional Claims are Without Merit.

Assuming arguendo, that Petitioners did properly raise their constitutional arguments in the Connecticut state courts, these claims are not cognizable for a number of reasons, including but not limited to, those set forth below.

A. The Seventh Amendment Right to Trial by Jury Does not apply to State Courts.

The Seventh Amendment "relates only to trials in the courts of the United States." Walker v. Sauvinet, 92 U.S. 90, 92 (1875); see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996).

> The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship,

[7] Both actions were originally filed in the federal district court and involved claims under the federal Quiet Title Act, 28 U.S.C. § 2409a et seq.

> which the States are forbidden by the Fourteenth Amendment to abridge.

Walker, 92 U.S. at 92.

As this matter was tried in Connecticut state court, the Seventh Amendment to the Constitution does not apply, and Petitioners' claims that they were denied their right to a jury trial under the Seventh Amendment are without merit.

B. There was No Unreasonable Search and Seizure in Violation of the Fourth Amendment.

Petitioners have not cited – and Republic has not found – any authority supporting Petitioners' claim that the foreclosure of the mortgage upon their property constitutes an unreasonable seizure under the Fourth Amendment to the Constitution. As with Petitioners other claims under the Constitution, it is respectfully submitted that this claim is entirely without merit.

C. Petitioners Were not Denied Due Process Under the Fifth Amendment and Fourteenth Amendments.

Petitioners were not denied due process under the United States Constitution. In the first instance, Petitioners have no constitutionally protected property rights in the subject property See McCachren v. USDA, 599 F.2d 655, 656-57 (5th Cir. 1979)

(mortgagor has no constitutionally protected property interest in mortgaged property where there is a default under the mortgage giving mortgagee the right to foreclose).

Additionally, Petitioners have been provided with an opportunity to be heard at a meaningful time and in a meaningful manner as is required by the United States Constitution. See Mathews v. Eldridge, 424 U.S. 319 (1976). As Petitioners have conceded, they have participated in two trials of this matter, have made two appeals to the Connecticut Appellate Court and have petitioned the Connecticut Supreme Court to review their claims of error. Petitioners have taken advantage of every available avenue of appeal, and now – in one final attempt to delay the inevitable resolution of this action – Petitioners have requested that this Court grant them a writ of certiorari.[8]

[8] To the extent that Petitioners assert constitutional tort claims against FDIC, such claims have been considered and rejected by this Court. See FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996 (1994) (constitutional tort claims against FDIC not cognizable). Nor can the actions of FDIC acting as receiver for First Constitution provide the basis of a due process challenge to a state law. See Warren v. Government Nat'l Mtg. Ass'n, 611 F.2d 1229 (8th Cir. 1980).

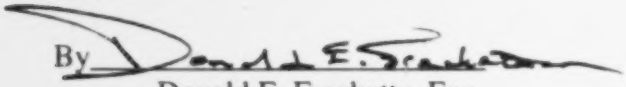
Since Petitioners do not have a constitutionally protected property right and have received more than the process due to them, the Petition should be denied.

CONCLUSION

The Petition should be denied because this Court lacks jurisdiction to decide the federal constitutional questions raised in the Petition for the first time. The Petition should also be denied because Petitioners cannot – as a matter of law – establish that their rights under the United States Constitution were violated.

Dated at Hartford, Connecticut this 11th day of July, 2002.

RESPECTFULLY SUBMITTED,
RESPONDENT REPUBLIC
CREDIT CORPORATION I,
INC.

By 

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APPENDIX

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FDIC v. Joseph Caldrello, et. al., Petition For Review, AC 20144 (2/13/2002) A-1

First Constitution Bank v. Joseph M. Caldrello, et. al., 37 Conn. App. 529 (1995) A-13

SUPREME COURT OF THE STATE OF CONNECTICUT

AC 20144 APPELLATE COURT

FDIC AS RECEIVER FOR FIRST FOR
FIRST CONSTITUTION BANK

V.

JOSEPH CALDRELLO ET AL FEBRUARY 13, 2002

PETITION FOR REVIEW

1. QUESTIONS PRESENTED FOR REVIEW

a. Did the Appellate Court err when it stated that the allegations as to the unclean hands of the FDIC were not raised in the original appeal and subsequently properly not addressed by the trial court?

b. Does alleged fraud committed upon the court allow this court to open the judgment and remand it for a new trial?

c. Did the Appellate Court err in ruling that the defendants were not entitled to equitable relief based on the actions of the First Constitution Bank and its successors in interest?

d. Did the Appellate Court err in finding that there was nothing unusual about the mortgage?

e. Did the Appellate Court err in determining that the trial court had opened the judgment of non-suit for the reason that the

plaintiffs had not received notice thereof, instead of finding that the court had opened the non-suit for reasons of judicial economy?

2. BASIS FOR CERTIFICATION:

The basis of certification is:

a. That there are matters of great public importance involved in that:

i. In that there has been a course of conduct amounting to fraud by public officials, and bank officials perpetrated upon the court, and general public, and that justice requires that the defendants be allowed to present evidence of such to a trial court.

ii. In that the equities in this case require this court to order equitable relief on behalf of the defendants.

b. That the appellate court decided an issue differently from an earlier decision of such court.

3. SUMMARY OF THE CASE

This case is a foreclosure case brought in 1989 by the then First Constitution Bank against the defendants Sandra Caldrello, Joseph Caldrello and others. The matter originally went to judgment, for the plaintiffs, in 1992, and an appeal was filed by the Caldrello family. While the appeal was pending First Constitution

Bank failed and its assets were taken over by the FDIC. The FDIC removed the matter to federal court. The matter was subsequently brought back to the Appellate Court, where these defendants successfully prosecuted the appeal.

The case was remanded back to the trial court, a pre-trial was noticed at which the defendants, but not the plaintiffs, appeared. The plaintiff was non-suited, and more than 18 months passed before the plaintiffs filed a motion to open up that judgment. Such motion was granted, and a new trial was conducted. This opening of the non-suit was one of the basis for the appeal and the appellate court found that the plaintiffs had no notice of the non-suit and that opening it up was therefore justified.

At the trial the defendants introduced evidence of actions on the part of the First Constitution Bank and its successor in interest, the FDIC, and that such action on their prevented Mr. & Mrs. Caldrello from making the mortgage payments, causing this action to be brought. The court ignored this testimony and the appellate court concurred concluding that its introduction was res judicata.

After the trial court decided all issues in favor of the plaintiffs at trial, a new appeal was then taken, and such appeal was denied on January 25, 2002. This petition follows.

4. ARGUMENT

a. It is respectfully submitted that the Appellate Court erred when it stated that the issues as to unclean hands of the plaintiff had not been raised at the time of the earlier appeal (lines 303-311 of the decision), and that therefore it was not properly before the court.

This conclusion is flawed for two reasons. First, the original Appellate Court did note the issues had been raised. It stated that the defendants had filed a counterclaim and then it decided the appeal on one narrow issue. The original Appellate Court specifically did not address the other issues, leaving them for the trial court on remand.

At the trial the defendant addressed these issues. This is really an issue of surprise. The plaintiffs claim a lack of due process. This argument has no weight. Due process requires notice and an opportunity to be heard, see Cantazaro v. City of Middletown, 2nd Cir. (1997). The plaintiffs got that. The plaintiff

knew the claims that the defendants were raising, indeed they had know about them for at least seven years. Any claim that they did not know is just not credible. Indeed the plaintiff acknowledged that they had known of these issues from very early on.

Second, the Appellate Court stated that although the issues were not properly before the trial court the court had discretion to hear them (decision at lines 312-319). The court could not have it both ways. It either has discretion to hear the claims or it did not. It is respectfully submitted that the Appellate Court erred when it concluded that the trial court's conclusions as to the equities was proper holding they were not raised below.

b. It is respectfully submitted that there were frauds perpetrated upon the court by the plaintiff and/or its successor in interest.

It has long been held that if a party perpetuates a fraud upon the court the judgment is subject to being opened. See Hazel-Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In that case the true author of an article was withheld from the court and the Supreme Court vacated the judgment. The courts have also held that proof of scienter may be inferred from circumstantial evidence.

See Canel v. Lincoln Bank, (Northern District of Illinois, 1998). Also a bank is charged with knowledge of what is in its records. See Curtis v. Connly, 257 U.S. 260 (1921).

It is respectfully submitted that on a number of occasions there have been frauds perpetuated. Some of them are as follows:

i. In that Tim Doheny, former officer of the bank, testified at the first trial as to the origin of certain records and testified differently as to those records at the second trial. He also testified differently about payments and alleged write-downs.

ii. In that the FDIC never produced a large number of documents in discovery that were in its possession.

iii. In that representatives of the FDIC at the second trial misrepresented to the court the true effect of certain bank documents.

iv. At the second trial an officer of the FDIC testified that it was proper to give verbal consent to a tax sale when in fact the FDIC's established procedures required written consent using a specific form.

v. Attorney Kosto agreed not to transfer this property before this litigation had been resolved, and then the FDIC transferred it anyway.

vi. The FDIC produced at trial purported copies of mortgage documents without actually producing the original documents.

These actions on the part of the bank and the FDIC constitute a continuing course of conduct and give rise to a right to a new trial on the merits in front of a jury. See Russell v. Todd, 309 U.S. 280 (1940), and City of Monterey v. Del Monte Dunes Corporation, 119 S. Ct. 1624 (1999).

c. It is respectfully submitted that the Appellate Court erred when it concluded that the equitable claims raised by the defendants were barred on res judicata grounds (decision at lines 333-340.

Under the doctrine of res judicata, a final judgment, when *rendered* on the *merits*, is an absolute bar to a subsequent action between the same parties or those in privity with them upon the same claim, Mazziotti v. Allstate Insurance Co., 240 Conn. 799,812 (1997) emphasis supplied.

However, the doctrine of claim preclusion should be flexible and must give way when its mechanical operation would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal consequences. In re David W., 52 Conn. App. 576, certification denied, 249 Conn. 908, certification granted (as to other issues), 249 Conn. 907, reversed in part (as to other issues) 254 Conn. 676 (1999).

Two requirements for res judicata are identity of cause of action or of issues, and adjudication on the merits, New Milford Block Co. v. Ericson, 3 Conn. Cir. Ct. 1 (1964).

The conclusion of the Appellate Court flies in the face of all of these principles. The decision of the Federal Court was not based on the merits. It was based on procedural matters and there was never a trial on the merits. For that reason the doctrine of res judicata just does not apply.

Furthermore, there is a larger societal issue here. Mr. Caldrello and Mrs. Caldrello deposited a $500,000.00 cashier's check into his personal account. Drawing on those good funds he deposited $300,000.00 into one of his business accounts. These

funds were not properly recorded by the bank, and when inquiries were made, at that time, the bank officials refused to acknowledge any problems or to rectify them. They also took funds belonging to the Caldrello children improperly.

Nor did the bank or FDIC ever make any efforts, at all, as they had a duty to, to inform the Caldrello's creditors what had happened. This seriously injured them and impaired their ability to pay this mortgage.

Substantial trust funds owned by the children were also lost by the bank's malfeasance, also covered up by the bank and FDIC officials.

No one from the bank or the FDIC has ever denied that such occurred. The problems with the checks and the banks failure to address the issue, caused the Caldrello family, Mrs. Caldrello and the three girls included, to lose virtually everything. The plaintiff has hidden documents, and almost certainly destroyed documents. Specifically the FDIC failed to disclose documents as to the sale of a franchise to a Mr. Donald Toresco, about which witnesses for the defendant testified actually existed. The FDIC also did not notify the defendants of an action brought by the FDIC

against the successor company to First Constitution Bank making allegations similar to those made by the Caldrellos.

The situation demands that they be given the justice so far denied to them. This is similar to the Enron situation presently unfolding. Employees and investors losing everything. These situations, this situation, if left unaddressed by the courts, create cracks in the very foundations of our system. It is respectfully submitted that they should have the opportunity to have justice served, and that this court should take this matter.

d. It is respectfully submitted that the Appellate Court erred in finding that there was nothing unusual about the mortgage (decision at 326-328).

It is very important to note that although Mrs. Caldrello signed the mortgage there was no way she could have paid it based on her circumstances. She was a housewife, with three young children and she was not working.

The mortgage was supposed to be a temporary one, providing funds for Mr. Caldrello's businesses until she and her husband could complete a sale of one of his automobile franchises. The money lost by the bank was the first installment of those funds.

In addition the mortgage was a construction mortgage, as evidenced by the loan documentation introduced at trial. This despite the FDIC's assertion to the contrary at the second trial of this case.

e. It is respectfully submitted that the Appellate Court erred in ruling that the trial court had acted properly in allowing the judgment of non-suit to be opened.

The law is quite clear on opening up non-suits after four months. A trial court has no jurisdiction to open a judgment beyond the four month statutory period, Serrano v. Behar, 15 Conn. App. 308 (1988), Mecklenburg v. Pan American World Airways, Inc., 196 Conn. 517 (1985).

It is clear from the record that Judge Hendel opened the non-suit on this case for reasons of judicial economy (April 11, 1997 transcript at 14) after finding that the plaintiff had received notice of the non-suit.

Although the Appellate Court states that Judge Hendel had grounds to find no notice was received (decision at lines 138203), he made no such finding, rather he made a finding that it had gotten

notice. Therefore it is respectfully submitted that the Appellate Court erred and the court should hear this case.

CONCLUSION:

For all of the reasons recited above, it is respectfully submitted that certification should be granted.

CERTIFICATION:

I hereby certify that on this date copies of the foregoing, with attached appendix were mailed to those parties on Exhibit A.

of untrustworthiness since such evidence 'is customarily grist for the jury mill.' " *State* v. *Fullwood*, 193 Conn. 238, 254, 476 A.2d 550 (1984); *State* v. *Rivera*, 32 Conn. App. 193, 202, 628 A.2d 996, cert. denied, 227 Conn. 920, 632 A.2d 698 (1993).

We have already set out in detail the facts that the jury could reasonably have found. On the basis of the evidence before it, the jury could reasonably have concluded, as it did, that the sole proximate cause of the collision was the negligent conduct of the operator of the vehicle in which the plaintiff was a passenger and against whom she elected not to bring an action.

The judgment is affirmed.

In this opinion the other judges concurred.

First Constitution Bank *v.* Joseph M. Caldrello et al.
(11807)

Dupont, C. J., and O'Connell and Landau, Js.

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants, J and S. J and S filed an answer and counterclaim denying that the mortgage note was in default and alleging an improper setoff by the bank against certain certificates of deposit. The trial court rendered judgment of strict foreclosure, from which J and S appealed to this court claiming, inter alia, that that court improperly refused to permit their attorney, M, to testify as to when certain documents had been given to the bank. The trial court, relying on the representations of the bank's attorney, excluded those documents from evidence on the ground that they had not been timely produced in discovery. *Held* that the trial court impropely refused to permit M to testify; an attorney is not automatically barred from testifying in a case because of his status as a legal advocate for a party, and, because the trial court relied on the representations of the bank's attorney without hearing from the person whose responsibility it was to comply with the discovery request, the ruling was not harmless, and a new trial was required.

Argued December 7, 1994—decision released April 11, 1995

Action to foreclose a mortgage on certain real property, brought to the Superior Court in the judicial district of New London, where the named defendant et al. filed a counterclaim; thereafter, the matter was tried to the court, *Hurley, J.*; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Reversed; new trial.*

Richard D. Haviland, for the appellants (named defendant et al.).

Gail S. Kosto, for the appellee (plaintiff).

LANDAU, J. The defendants Joseph M. Caldrello and Sandra V. Caldrello[1] (hereafter the defendants) appeal from the judgment of strict foreclosure rendered by the trial court as to property they owned. They claim that the trial court (1) improperly denied Joseph M. Caldrello, appearing pro se, the opportunity to argue at the trial, (2) improperly failed to admit certain bank documents into evidence, (3) improperly failed to permit the defendants' counsel to testify on behalf of the defendants despite having permitted the plaintiff's counsel to testify, and (4) allowed the appearance of an unfair trial. Because we find the third issue dispositive, we need not address the remaining three.

[1] While not involved in this appeal, the following parties were also defendants in the underlying action: Donald M. Toresco; Tim Broyles, doing business as Concrete Concepts; Bank of New Haven; Connecticut National Bank; Allen Electric, Inc.; United Builder's Supply, Inc.; Pioneer Credit Corporation; Denrich Leasing Corporation; Master Lease Corporation; Bell Atlantic Tricon Leasing Corporation; K.L.C., Inc., doing business as Keystone Leasing; Soneco Service, Inc.; Bondi & Lenzini Enterprises, Inc.; Norman Wood General Contractors, Inc.; Fleet Credit Corporation; Day Publishing Company, Inc.; New England Capital Corporation; Transamerica Automotive Finance Corporation; Laurence J. Patton; Midatlantic Commercial Leasing Corporation; Capital Resource Leasing, Inc., doing business as Total Leasing, Inc.; Automatic Solar Covers, Inc., doing business as Poolsavers; Monsignor Paul J. St. Onge; Victor Cartier; Cathy Cartier; and Carl Sherman.

The following facts are not in dispute. In November, 1988, the defendants executed a note and mortgage to First Constitution Bank (bank).[2] The bank commenced an action to foreclose the mortgage in September, 1989, alleging that the note had not been paid according to its terms. The defendants filed an answer and counterclaim, in which they denied that the note was in default and alleged an improper setoff by the bank against certain certificates of deposit owned by the defendants.

The trial court heard the foreclosure action on September 3, 4 and 8, 1992. Appearing in court for the defendants on September 3, were Philip Mancini, an attorney, Joseph M. Caldrello, appearing pro se, and Gregory McCauley, an attorney appearing pro hac vice.[3] The proceedings on that day consisted solely of preliminary matters. When the actual trial commenced on September 4, Mancini was not present. It was agreed that Joseph M. Caldrello and McCauley would represent the defendants at the subsequent proceedings.

During the trial, the defendants attempted repeatedly to introduce documents allegedly prepared by the bank, which purportedly showed that the mortgage was current and that the debt owed by the defendants was

[2] In December, 1992, First Constitution Bank failed and the Federal Deposit Insurance Corporation became its receiver.

[3] In November, 1991, the defendants filed a request for leave to amend their counterclaim, seeking to add lender liability counts arising from the alleged mishandling by the bank of the defendants' personal accounts. McCauley, a Pennsylvania attorney, was admitted pro hac vice in this matter to represent the defendants for the purpose of handling the lender liability issue only. Although the request for leave to amend had been denied on November 6, 1991, McCauley was present on September 3, due to a pending motion to reargue the defendants' request for leave to amend the counterclaim. Also, as a nonattorney pro se, Joseph M. Caldrello could represent only himself and not Sandra Caldrello. See General Statutes § 51-88.

less than the amount claimed by the bank.[4] The bank objected to each offer on the ground that the documents had not been produced in discovery. The court, relying on Practice Book § 232,[5] ruled each time that the documents were inadmissible, but offered the defendants the opportunity to prove their claim that Mancini had given the documents to the bank. On this point, the court heard the testimony of Richard Lathrop, a lay witness who stated that he saw Mancini produce the documents. The court also heard Joseph M. Caldrello's testimony as to when and where various documents were produced. When the defendants attempted to call Mancini, however, the court refused to permit his testimony, noting that he could not be a counsel of record and a witness.[6] In an oral offer of proof, McCauley stated that Mancini would have testified that all of the documents, with one exception, had been given to the bank long before the trial.

Mancini is not automatically barred from testifying in the case because of his status as a legal advocate for the defendants. "An attorney is not disqualified or rendered incompetent to testify when he has participated in the trial of a case, even though testifying as a witness under those circumstances may be violative of the

[4] The documents, all admitted for identification purposes only, were: (1) an escrow analysis dated August 17, 1992; (2) a statement of mortgage account dated December 31, 1990; (3) a statement of mortgage account dated October 24, 1991; and (4) an escrow analysis dated September 11, 1991.

[5] Practice Book § 232 provides: "If, subsequent to compliance with any request or order for discovery and prior to or during trial, a party discovers additional or new material or information previously requested and ordered subject to discovery or inspection or discovers that the prior compliance was totally or partially incorrect or, though correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment, he shall promptly notify the other party, or his attorney, and file and serve in accordance with Sec. 120 a supplemental or corrected compliance."

[6] The court did allow counsel for the bank to represent that Mancini had not given her the documents in question.

rules of professional conduct and may subject him to disciplinary action. *State* v. *Blake*, 157 Conn. 99, 102, 249 A.2d 232 (1968)." *Puglio* v. *Puglio*, 18 Conn. App. 606, 608, 559 A.2d 1159 (1989). Although an attorney may be in violation of rule 3.7 of the Rules of Professional Conduct,[7] "[t]his does not disqualify or render incompetent, as a witness, an attorney who has participated in a trial, and it is error to refuse to permit him to offer himself as a witness. *Lebowitz* v. *McPike*, 151 Conn. 566, 570, 201 A.2d 469 [1964]; *Miller* v. *Urban*, 123 Conn. 331, 334, 195 A. 193 [1937]; *Sengenbush* v. *Edgerton*, 120 Conn. 367, 370, 180 A. 694 [1935]; *Erwin M. Jennings Co.* v. *DiGenova*, 107 Conn. 491, 497, 141 A. 866 [1928]." *State* v. *Blake*, supra, 102. Furthermore, when Mancini's testimony was offered, it was arguable whether he was representing the defendants since it had been previously agreed that McCauley and Joseph M. Caldrello, pro se, would represent the defendants.

The bank concedes that it was improper for the trial court not to permit Mancini to testify.[8] It argues, however, that the error was harmless. We disagree. In ruling on the admissibility of the documents, the trial court relied on representations made by the bank's counsel that the documents had not been timely produced by Mancini. Although the trial court held a hearing on the

[7] Rule 3.7 of the Rules of Professional Conduct provides in pertinent part: "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

"(1) The testimony relates to an uncontested issue;

"(2) The testimony relates to the nature and value of legal services rendered in the case; or

"(3) Disqualification of the lawyer would work substantial hardship on the client. . . ."

[8] Both parties argue at some length about the fairness of the trial court's permitting the bank's counsel to "testify" while not permitting the defendants' counsel to do so. The attorney for the bank did not testify, but rather made certain representations in response to a question directed to her by the trial court.

admissibility of the documents and heard from a lay witness that Mancini produced the documents, it failed to hear from the person whose responsibility it was to comply with the discovery requests. We cannot say that the result would not have been different had Mancini, the attorney who allegedly produced the documents, been permitted to testify.

Because the ruling of the trial court was improper and not harmless, we must reverse the judgment of the trial court.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL CUTRO
(13315)

LANDAU, SPEAR and FREEDMAN, Js.

Convicted of the crimes of public indecency and risk of injury to a child, the defendant appealed to this court claiming that the state failed to establish beyond a reasonable doubt the necessary elements of the crimes and the required nexus between his actions and the alleged victim. The defendant had been arrested after he was observed masturbating in his car in a public parking lot. He argued that the alleged incident occurred after dark in an area lighted only by street lamps, that there were no other people around and that three cars were parked between his car and the victim's. He also argued that he did not perform a lewd exposure of his body or act wantonly in reckless disregard of the rights of others. *Held:*

1. The cumulative effect of the evidence presented was sufficient to support the defendant's conviction of the crime of risk of injury to a child since the jury reasonably could have found that the defendant's conduct was wilfull and in reckless disregard of its consequences, and created a situation likely to impair the morals of a child; it was not necessary to prove that the child knew what he was doing.
2. The jury could reasonably have concluded that the defendant was guilty beyond a reasonable doubt of public indecency; the evidence supported